Treasury Regulations 111, promulgated under the Internal Revenue Code:[12]

SEC. 29.211-2. Definition.—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or *sojourner* is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resi-

[12] These Regulations were effective for the taxable years 1942 through 1944. Treasury Regulations 103, effective for the year 1941, are not reproduced here since they are essentially the same as Treasury Regulations 111.

dent of the United States within the meaning of this section, in the absence of exceptional circumstances. (italics added)

SEC. 29.212-1. Gross income of nonresident alien individuals.—

• • • • •

(b) *United States Business.*—

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The effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian does not bring a nonresident alien individual within the class of nonresident alien individuals engaged in trade or business within the United States, but if a nonresident alien individual by reason of rendering personal services in the United States, or for other reasons, is classed as a nonresident alien individual engaged in trade or business within the United States, he is taxable upon all income from sources within the United States, including profits derived from the effecting of such transactions. • • •

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 619

ZAREH NUBAR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 7-26) is reported at 13 T.C. 566. The opinion of the Court of Appeals for the Fourth Circuit (R. 44-53) is reported at 185 F. 2d 584. The opinion of the Court of Appeals denying the taxpayer's petition for rehearing (R. 84-85) is reported at 185 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1950 (R. 54). The order of

the Court of Appeals denying the petition for rehearing was entered on December 20, 1950 (R. 85-86). The petition for a writ of certiorari was filed on March 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that taxpayer was a resident of the United States within the meaning of Section 211(a) of the Internal Revenue Code.

2. Whether, if not, the Court of Appeals properly held that taxpayer was, in any event, engaged in trade or business within the United States within the meaning of Section 211(b) of the Code.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 15-19.

STATEMENT

The material facts summarized by the Court of Appeals (R. 45-46) from the Tax Court's undisputed primary findings (R. 9-18) are as follows:

Taxpayer is a wealthy Egyptian national. Prior to World War II he lived with his family in France and Switzerland, maintaining an apartment in Paris and a summer home in Geneva. He arrived in the United States on August 1, 1939, and remained here constantly until August 15, 1945. His purpose in coming was to visit the New York World's Fair and to travel in this country and

in Central and South America. He was admitted on a three-month visitor's visa. After the war in Europe began, taxpayer applied for, and obtained, a number of extensions which expired on December 31, 1940. In January, 1941, he was arrested on a charge of being in the country in violation of the immigration laws. He was released on bond and applied for, and obtained, a number of delays in the proceedings. The Board of Immigration Appeals determined in 1944 that an order of deportation would not be entered at that time, but that the taxpayer would be required to leave the United States at his own expense within ninety days after the termination of hostilities in Europe. (R. 45.)

During 1940 and 1941, the taxpayer made applications for visas to visit Mexico, but these were denied. He was told by the French consulate in 1940, upon his inquiry, that he could not return to that country. In 1941, he was successful in obtaining a Swiss visa but could not obtain visas from the French, Spanish and Portuguese consulates. He abandoned the plan to return to Switzerland at that time because of "the delays in getting other visas, plus the dangers of wartime travel and poor health." Thereafter, for four years he made no further effort to leave the country, but settled down to wait out the war, and this he did very profitably. In making applications for extensions of visas, he asked as early as 1939 that he be allowed to

stay "for a year or until the end of the war." He made no real effort to leave the country for Europe until after the war was over. (R. 45-46.)

Prior to coming to this country, taxpayer had engaged in trading on stock and commodity exchanges on a large scale. In 1930, he opened accounts in New York with brokerage firms having Paris connections. In 1938, he transferred $165,000 to his account with one of these firms. This sum was used to purchase on margin securities which were sold shortly thereafter. When he arrived here the next year, taxpayer had a credit balance of $202,709 with this firm, $32,000 with another, and securities valued at approximately $100,000 deposited with a New York bank. When he left the country in 1945, he owned securities of a value of $2,496,952 and owed $721,423.53 for money which he had borrowed. (R. 46.)

Although taxpayer's accounts with his brokers were relatively inactive in 1939 and 1940, they became extremely active in the tax years. In 1941, there were 77 purchases of stocks and bonds and 60 sales; in 1942, 243 purchases and 60 sales; in 1943, 185 purchases and 111 sales; and in 1944, 125 purchases and 97 sales. The net capital gain on these transactions was $62,795, $62,281, $229,244 and $202,823, respectively. They involved the purchase of 217,423 shares of stock and a sale of 113,001 shares. The total value of the securities pur-

chased and sold was in excess of six and a half million dollars. (R. 46.)

During the same years, taxpayer was dealing in commodities futures, buying and selling "practically all" commodities, including cotton, wheat, sugar, pepper, silk and lard, on which he realized gains of $62,795 in 1941, $2,775 in 1943 and $1,660 in 1944. He sustained a loss of $4,162 in 1942. Since the trading in both securities and commodities was on exchanges, the orders were effected through brokers. All of the trading occurred on margin and required the constant attention of the taxpayer while he was living in the United States. (R. 46.)

The Commissioner determined deficiencies for 1941, 1943 and 1944, on the theory that the taxpayer was a resident of the United States during those years. He contended also that even if the taxpayer were a nonresident, he was taxable on his net capital gains on securities and commodities transactions for the reason that the exchange transactions constituted a trade or business under Section 211(b) of the Internal Revenue Code. (R. 8-9.)

The Tax Court, in a decision not reviewed by the full Court, held that the taxpayer was a nonresident of the United States during the years in question and that he was not engaged in trade or business (R. 18-26.) The Court of Appeals reversed (R. 44-53).

ARGUMENT

I

A. The decision of the Court of Appeals that the taxpayer, during the tax years, was a resident alien[1] is correct and there is no conflict of decisions. The decision was expressly predicated on the application of the Tax Court's findings to the Treasury Regulations,[2] the validity of which has been previously upheld (*Swenson* v. *Thomas,* 164 F. 2d 783, 784 (C.A. 5th); *Myers* v. *Commissioner,* 180 F. 2d 969, 971 (C.A. 4th)), and is not questioned here. The controlling effect of Treasury Regulations, where applicable, has been repeatedly attested by this Court. See, e.g., *Commissioner* v. *South Texas Co.,* 333 U.S. 496; *Commissioner* v. *Wheeler,* 324 U.S. 542; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90.

There is no real question that the result below is fully in accord with the Regulations. They define a "resident" for income tax purposes as "an alien actually present in the United States who is not a mere transient or sojourner." It is apparent that the Regulations use the terms "transient" or "sojourner" synonymously (as the antonym of "resident") to mean one who is in the United States for a "definite purpose" that may be "promptly

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[1] And, accordingly, was not entitled to the preferential tax treatment accorded "non-resident aliens" by Sections 211(a) and 212 (Appendix, *infra,* pp. 15, 17).

[2] Section 29.211-2, Treasury Regulations 111 (Appendix, *infra,* pp. 17-18), applicable for 1943 and 1944 and Section 19.211-2, Treasury Regulations 103, applicable to 1941.

accomplished." They continue, "but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident" notwithstanding that "it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned." The facts found by the Tax Court indicate that taxpayer's original purpose in coming to the United States to stay only a few months as a typical tourist (R. 10-11) was abandoned when, as early as 1939 (R. 11), he decided to remain in the United States because of the "dangers of war time travel and poor health" (R. 13), and, to accomplish that purpose, made the first of a series of applications for the extension of his visa for "one year or the end of the war" in order to remain in the United States until the termination of hostilities in Europe (R. 13). From that time on, his purpose, in the language of the Regulations, was "of such a nature that an extended stay * * * [would be] necessary for its accomplishment, and to that end" he made "his home temporarily in the United States."

The Tax Court's conclusion that taxpayer was a nonresident was reached without even passing reference to the controlling Regulations (R. 18-22) and, as the Court of Appeals correctly noted, was

based (R. 48)[3] on a clear error of law, the confusion of the terms "residence" with "domicile."

The decision below can, moreover, be fully justified even independently of the Regulations. In *Helvering* v. *Stockholms &c. Bank,* 293 U.S. 84, 89-90, this Court stated that the general purpose of the provisions of the revenue laws dealing with nonresidents was to "put money into the federal treasury" and that "there is manifest * * * an intention on the part of Congress to bring about a generous attainment of that object * * *." The Court continued that far from intending to discriminate in favor of foreign corporations, if any discrimination had been intended it would have been made in favor of, "not against," the domestic corporation "which contributes in a much more substantial degree to the support of the people and government of the United States."

These principles, as applied to individuals, were unqualifiedly reaffirmed in *Commissioner* v. *Wodehouse,* 337 U.S. 369, 378. On the basis of these

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[3] The Tax Court quoted *Barhydt* v. *Cross,* 156 Iowa 271, with approval as follows (R. 20): "It is therefore very generally agreed that the words 'resident' or 'inhabitant,' in statutes referring to taxation, are synonymous with the legal term 'domiciled'; and that a man must pay his taxes as a 'resident' at his place of domicile * * *." The remainder of the opinion (R. 20-26) demonstrates that it was the application of this misconception of the meaning of "resident" in the Internal Revenue Code to the uncontested facts that resulted in the patently erroneous conclusion which the decision of the Court of Appeals corrected.

cases, we think the Court of Appeals correctly interpreted the statute when it said (R. 47):

> We find nothing in the law or in the facts to justify the exemption of this alien, who had lived in our country during the war years because of the difficulties and dangers of departure, and who had availed himself of his presence here to make a fortune by trading on our exchanges, from taxes required of others by the country whose protection he had enjoyed and whose economic organization he had utilized for his profit.

B. The contention (Pet. 6-7) that the writ should issue because in this case there is presented for the first time to this Court the effect of an "enforced" stay in determining residence is not only not a good ground for the issuance of the writ in view of the obvious correctness of the result below on the basis of conformance with the Regulations and the controlling rules of statutory construction in this field, but the record falls short of even establishing that taxpayer's presence was due to constraint.[4]

C. The contention (Pet. 7) that this case directly "conflicts in principle" with *McGrath* v. *Kristensen,* 340 U.S. 162, and (Pet. 8, 9) *Neuberger* v. *United States,* 13 F. 2d 541 (C.A. 2d), "as well", is without foundation. Neither case dealt with the

[4] The Tax Court's findings fairly evaluated, as the Court of Appeals accurately noted (R. 50), show at best taxpayer's preference to remain in the United States because of "difficulties" in obtaining visas, dangers of foreign travel, and the condition of taxpayer's health.

term "resident" as used in the Internal Revenue Code.[5] The opinion of the Court in *Kristensen* expressly observed (p. 175), after citing the Regulations applicable here, that "The definition [of resident] varies with the statute." The refusal of the Court to hold (p. 176) that Kristensen was a resident "without regulations so defining residence" in itself conclusively distinguishes this case where the Regulations direct the result.

D. The attack on the decision below (Pet. 9-11) on the ground that the court exceeded its proper scope of review on the basis of the decisions in *United States* v. *Real Estate Boards,* 339 U.S. 485, and *United States* v. *Yellow Cab Co.,* 338 U.S. 338, is without foundation. The decision below (R. 45, 47) was expressly and accurately predicated on the findings of the Tax Court. The alleged *"de novo"* findings (Pet. 9, 10, 11) were no more than paraphrases of the findings of the Tax Court. The disagreement of the Court of Appeals with the Tax Court was with the construction of the statute and not at all with its view of the evidentiary facts.

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[5] The "striking" factual parallel between this and the *Kristensen* case to which taxpayer directs attention (Pet. 8) is superficial. The uncontroverted allegation of Kristensen's complaint was that the outbreak of World War II prevented his return to Denmark and that "economic necessity" forced him to become employed (340 U.S. 162, 165). These circumstances should be contrasted with the facts set out in note 4, *supra.* Similarly, in the *Neuberger* case, it was assumed, "for the purposes of this appeal", that Neuberger's stay in Germany was wholly involuntary. 13 F. 2d at 542.

II

A. The court below also concluded that taxpayer's net capital gains from his vast security and commodity speculation were subject to tax because earned from a trade or business under Section 211(b) of the Internal Revenue Code, Appendix, *infra,* pp. 15-17. That conclusion was at most an alternative holding because the court's conclusion that taxpayer was a resident in itself subjected taxpayer to the same tax not alone on his exchange profits, but on his gain from all other sources as well, without regard to Sections 211 and 212 (Appendix, *infra,* pp. 15-17) which deal only with nonresidents.

There is, then, no basis for issuance of the writ on the trade or business issue because that inquiry is not relevant unless there is a determination adverse to the Commissioner on the residence issue.

B. But even if the issue were properly in the case, there would be no basis for issuance of the writ. Taxpayer asserts (Pet. 11) that the "plain, simple and unequivocal language" of the statute requires the conclusion that a nonresident who places his exchange orders through resident brokers, as indeed under the organization of the exchanges all who would trade must do, is exempt from tax. But such a construction of the statute would exempt from tax all gain by nonresidents from security and commodity speculation. The

structure of the statute, its history[6] and the applicable rules of construction (*Helvering* v. *Stockholms &c. Bank, supra; Commissioner* v. *Wodehouse, supra*), preclude this result. Moreover, as the Court of Appeals noted (R. 52-53), this result was required by its decision in *Adda* v. *Commissioner,* 171 F. 2d 457 (C.A. 4th), certiorari denied, 336 U.S. 952, where that court thought (R. 53) the decision of the Tax Court (10 T.C. 273) "was so clearly correct that we affirmed with a per curiam opinion * * *."

C. The assertion that the decision conflicts with *Higgins* v. *Commissioner,* 312 U.S. 212 (Pet. 14-17), is without foundation. *Higgins* dealt not with speculation in commodities or securities, as here, but with the conservation of an estate. As this Court said (p. 218), "The petitioner merely

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[6] The provision excluding from trade or business "the effecting, through a resident broker, * * * of transactions in the United States in commodities * * * or in stocks" upon which taxpayer relies was added in executive session of the Senate Finance Committee at the suggestion of the Treasury Department (Confidential Hearings Before Committee on Finance, 74th Cong., 2d Sess. (Part 11), p. 46), and was intended as a clarifying amendment (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-22 (1939-1 Cum. Bull. (Part 2) 678, 691)). The amendment was thought desirable to put at rest the controversy which had arisen with respect to whether corporations were carrying on businesses in this country solely as a result of transactions effected from abroad through resident brokers. See *Union Internationale de Placements* v. *Hoey,* 96 F. 2d 591 (C.A. 2d). Moreover, the statute itself by the phrase "in the United States" strongly implies, what a common sense construction requires, that the exclusory provision is concerned only with nonresidents not physically in the United States.

kept records and collected interest and dividends from his securities, through managerial attention for his investments." Moreover, the conclusion that extensive speculation can constitute a trade or business finds direct support in numerous other decisions. Cf. *Snyder* v. *Commissioner,* 295 U.S. 134, 139; *Adda* v. *Commissioner, supra; Fuld* v. *Commissioner,* 139 F. 2d 465 (C.A. 2d); *Dart* v. *Commissioner,* 74 F. 2d 845 (C.A. 4th); *Wiesler* v. *Commissioner,* 6 T.C. 1148, affirmed without discussion of this issue, 161 F. 2d 997 (C.A. 6th); see *Gruver* v. *Commissioner,* 142 F. 2d 363, 367 (C.A. 4th); *512 W. Fifty-Sixth St. Corp.* v. *Commissioner,* 151 F. 2d 942, 943 (C.A. 2d); and see also *Helvering* v. *Winmill,* 305 U.S. 79.

D. Finally, there is no conflict even if taxpayer is correct (Pet. 16) that *Burnett* v. *Commissioner,* 118 F. 2d 659 (C.A. 5th), and *Helvering* v. *Wilmington Trust Co.,* 124 F. 2d 156 (C.A. 3d), reversed on other grounds, 316 U.S. 164, hold that speculation in securities does not constitute a "trade or business" under Section 23(a) of the Internal Revenue Code. Whatever the proper result is under that section, it is clear that Section 211(b) must include buying and selling commodities or the exclusion from the definition for those who effect such transactions in the United States through resident brokers is without meaning.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1951.

APPENDIX

Internal Revenue Code:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—

(A) [As amended by Sec. 106(a) and Sec. 160(e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition of Tax.*—[1] There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that * * *

(b) [As amended by Sec. 160(d) and Sec. 167 of the Revenue Act of 1942, *supra.*] *United*

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[1] The above provision is the form effective for the years beginning in 1942. The differences in the 1941 provision are not material to any issue of this case and is, therefore, not reproduced here.

States Business or Office.[8]—A nonresident alien individual engaged in trade or business in the United States shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily dealt in on an organized

[8] The above provision was effective for the taxable year 1942 and following years. This section as effective for 1941, prior to its amendment by Section 160(d) of the Revenue Act of 1942, *supra*, contained the phrase "or having an office or place of business therein" following the phrase "trade or business in the United States." Section 167 of the Revenue Act of 1942, *supra*, changed the 1941 provision by substituting the last sentence as set out above for the following: "Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian." Inasmuch as these changes are not material to the issues which we here raise, the Code provisions will be referred to as if they were identical for all of the three taxable years involved here.

commodity exchange, if the transaction is of the kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.

* * * * *

(26 U.S.C. 1946 ed., Sec. 211.)

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

* * * * *

(26 U.S.C. 1946 ed., Sec. 212.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:[9]

Sec. 29.211-2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States.

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[9] These Regulations are effective for taxable years 1943 and 1944. Treasury Regulations 103, effective for the year 1941, are not reproduced here since in all relevant respects they are essentially the same as Treasury Regulations 111.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * *

Sec. 29.211-7. *Taxation of nonresident alien individuals.*—

* * * * *

(c) *United States business.*—

* * * * *

As used in sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation not engaged in trade or business within the United States by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian. (See also section 29.212-1.) * * *

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